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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO RAMIREZ, Defendant and Appellant.	H023961 (Monterey County Super. Ct. No. SC019142)

Defendant Alfredo Ramirez, Mexican-born but an almost life-long resident of the United States with a wife and child born here, was deported on November 30, 1999, after serving a prison term for a 1994 residential burglary. When he was arrested on a parole violation inside the United States the following May, he was returned to prison and was prosecuted in federal court for illegal reentry. Because the prior burglary conviction constituted an "aggravated" felony under federal law (8 U.S.C. § 1326, subd. (b)(2)), he faced a sentence of up to 20 years in prison rather than two years. Defendant filed a motion in state court to vacate the burglary conviction on the ground that when he pled guilty, no one gave him the advisement made mandatory by Penal Code section 1016.5[1] that a conviction could result in deportation, exclusion from admission to the United States or denial of naturalization.[2] The court denied the motion because it was not

[1] Further statutory references are to the Penal Code unless otherwise stated.

[2] Section 1016.5, subdivision (a), requires that before a court accepts a plea of guilty or nolo contendere, it must advise the defendant on the record: "If you are not a (continued)

convinced defendant would not have pled guilty even had he been properly advised of the immigration consequences of his plea. The court also found that trial counsel was not ineffective for failing to advise defendant of the immigration consequences because counsel was unaware that defendant was not a citizen and no "concern about possible immigration consequences were [*sic*] triggered by the court or his client." Defendant challenges this ruling on appeal.

FACTS

In 1994, defendant appeared in Monterey County Superior Court with defense counsel Scott Erdbacher to plead guilty to residential burglary conditioned on no initial state prison sentence. The trial court advised him of his constitutional rights but although defendant was in the United States on permanent resident status, neither the court nor defense counsel ever advised him that the plea could have immigration consequences. Defense counsel denied knowing defendant was not a citizen. Defendant received 180 days in the county jail, half the sentence the court could have imposed. Several

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citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Thereafter, "[u]pon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." (§ 1016.5, subd. (b).)

violations of probation later,[3] probation was revoked and a suspended two-year mitigated term for the burglary conviction was ordered executed.

Upon completion of this term on November 2, 1999, defendant was paroled to the United States Immigration and Naturalization Service (INS) which deported him. Defendant reentered the United States in December 1999 and was arrested on May 19, 2000, for throwing a bottle of Snapple at his girlfriend.[4] The matter was handled as a parole violation for which defendant was returned to state prison.

Three months later, on September 27, 2000, a criminal complaint was filed in federal court charging defendant with illegal reentry. (8 U.S.C. § 1326, subd. (a).)

On January 23, 2001, attorney Robert J. Beles (habeas counsel) filed a petition for a writ of habeas corpus (No. HC3863) asserting that defendant's guilty plea should be set

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[3] Defendant violated his probation once each in 1996 and 1997. The first violation, a misdemeanor assault, resulted in an extended grant of probation; the second, an assault on his wife, resulted in a diagnostic study in state prison. (§ 1203.03.) After considering the evaluation the court imposed but suspended execution of a two-year prison sentence and reinstated and extended probation for two years from that date. The 1999 King City obstructing-a-police-officer charge (defense counsel stated, "he scurr[ied] away from an officer because he d[id]n't want a ticket for [not] being smogged") gave rise to the violation of probation charges which resulted in the executed prison term. The July 21, 1999, sentencing transcript shows that defendant had "recent convictions that aren't even the subject of any probation violations, two separate convictions." There was a driving under the influence in Santa Clara County that was pending since 1997 while defendant was in custody which he cleared up when he was released. In addition, he used a false name in another "matter down in King City" for which he got a $250 fine. The probation report showed that in 1993, defendant successfully completed a section 1000 diversion program for a violation of Health and Safety Code section 11350. In the 1994 probation report on the burglary charges, defendant gave four versions of the bicycle-stealing incident, three to the police officer and one to the probation officer. Commenting on defendant's untruthfulness, the probation officer stated, "At the present time, the defendant's over-all behavior appears to be indicative of someone suffering from the affects [*sic*] of a drug or cocaine dependency. He is evaluated as being a person who was probably stealing in order to support some kind of drug habit."

[4] Defendant and his wife were divorced and defendant had custody of his daughter.

aside because he had not been advised of the immigration consequences of his plea by the court or by counsel, and counsel's failure to so advise deprived him of the effective assistance of counsel. The habeas petition "was not decided on the merits but only on the technicality of defendant's state/federal custody status and that there is no custody requirement to bring a Motion to Vacate Conviction." Attorney Michael Pekin then filed a motion in Monterey County Superior Court to vacate the conviction. He showed that defendant's ties to the community were strong: defendant had lived in Salinas for 18 years by the time of the guilty plea in 1994 and he was married to an 18-year-old woman and had a two-year-old daughter born in the United States. His father had died, but his mother, godmother, and three siblings all lived in Monterey County. At the time of his initial arrest, he had a stable work history and was employed at Albertson's Market in Salinas. In June 1999, defendant was self-employed and ran his own business, "Compu-Tax and Duplication," licensed by the City of Salinas. Character letters from Alan Styles, former mayor of the City of Salinas, a number of business owners and business associates in Salinas, Maria Ortiz, center supervisor of the Mexican American Opportunity Foundation, Child Care Division, clients of defendant's print shop and tax advice business, and defendant's relatives established that defendant was hard-working, continuing his education at Hartnell College, very involved in his community, and very involved in the upbringing of his youngest sibling Angie and his daughter Ashley.

The motion to vacate was supported by declarations by defendant and attorney Erdbacher. The motion was opposed by a second declaration by Erdbacher submitted by Deputy District Attorney Ann C. Hill. In his first declaration, Erdbacher stated that notwithstanding defendant's Spanish surname, he did not inquire into his citizenship, he did not know that defendant was not an American citizen, and he did not inform defendant of the immigration consequences of his plea. In preparing the declaration, Erdbacher had consulted Hill, who felt, when she read the first declaration, that it did not

reflect what Erdbacher had told her. She obtained the second declaration from Erdbacher to counter the first.

In the second declaration, Erdbacher stated that he had not carefully read the declaration prepared by Pekin, and that it was not correct. He stated he told Pekin that he remembered the charges, the disposition that would keep defendant out of prison if he succeeded on probation, and that defendant had confessed to the crime, but he did not have a specific recollection whether he advised defendant in accordance with section 1016.5. Erdbacher did "not recall advising him and I do not recall not advising him." (Original underscoring.) Erdbacher stated his practice "for a number of years" was to advise "each of my clients of the contents of . . . [s]ection 1016.5 and the possible consequences of a felony conviction for a defendant who is not a citizen." However, Erdbacher did not know "exactly what year I began this practice. I cannot say with certainty that I was engaged in this practice in 1994, but I also cannot say with certainty that I was not giving this advisement to every client in 1994." Erdbacher denied telling Pekin that he failed to advise defendant of the immigration consequences of his plea.

Defendant's declaration stated that Erdbacher spent "at most a half hour discussing the case with me. He advised me to 'plead guilty' because I was 'upsetting the judge' and 'w[ould] get more time' if I did not plead guilty. [He] did not explain the charges, possibilities of prison or probation, or any of the immigration issues that could arise out of a guilty plea. He never asked me my immigration status at all." Defendant stated that if he "had known that a guilty plea could have the consequences of deportation, I would have pursued other alternatives and if there was no other way, I would have insisted on a jury trial. Short term incarceration meant little compared to being banished from the place that held all of my memories and being separated from my family."

In the prosecution's opposition to the motion to vacate, Hill complained that defendant waited too long to make the motion, hence, it was not " 'seasonably made'. . .

." Later, she submitted a copy of defendant's sworn statement to the INS, which she said stated that "he returned to the United States illegally to get his child, close his store and pick up his belongings. He states further that he was able to do these things and 'my spouse and I look forward to better our lives in my home country.' "[5]

Defendant's declaration addresses his failure to act earlier: "In the six years that I spent on probation after the conviction, no one discussed immigration consequences with me, although I had four different probation officers and had been represented by a series of attorneys. [¶] 5. The INS first contacted me in prison on August 17, 1999[,] and told me they were investigating whether or not I should be deported. The contact was brief and no INS hold issued . . . . Shortly before my parole date, I was interviewed by my Correctional Counselor, given my parole papers to sign, and told that I had no holds or warrants. I told the counselor that the INS had mentioned a possibility of deportation to me. The counselor told me that if anything was going to happen, a hold would have been placed on me long before. He also told me that usually, where an inmate is serving a small amount of time before they are due to be paroled, such as my case, the INS had a tendency to leave the case alone. Because of what my counselor told me, I saw no reason to contact my attorney or my family about a possible deportation. Also, I was incarcerated in a 'Reception Center' where we were only allowed mail privileges (not telephone privileges) and mail was normally 'backed up' for about two weeks.

"6. The INS placed a hold on me a day before my scheduled parole date. On my parole date, I was immediately taken to an Immigration Detentio [*sic*] Facility in Eloy[,]

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[5] Defendant's words were: "I have a U.S. citizen child that I had to come back and make arrangements for and also my job employment had to come back and closed [*sic*] down store and pick up my belongings. Now, I have been able to do these things and my spouse and I look forward to better our lives in my home country. We face long road but we are willing to make sacrafices [*sic*] necessary to live happy trouble free life." The spouse is Araceli Dominguez Ramirez, the girlfriend at whom defendant threw the bottle of Snapple.

Arizona without any opportunity to notify my attorney or my family. I was held for about a month at the facility pending a hearing before a judge. During this time, my family and I made several attempts to contact different attorneys and agencies. We were told that the services were not readily available, and the attorneys we talked to did not have any skill or knowledge in the area.[6] I did not have appointed counsel available to me during the immigration proceedings, and only had the option of retaining private counsel. None of the attorneys we approached appeared to know of any defense to the case. Given the information that we had at the time, I believe that both my family and I did the most that we could to get assistance with these matters. It was difficult to find anyone with any immigration expertise in Monterey County but after continued inquiries and research, we were finally able to find attorneys who are knowledgeable about this area of the law. [¶] 7. The primary reason for filing the motion to vacate the guilty plea is to try to gain back my resident status. The only way I can do that is to move to set aside the guilty plea."

The trial court's order denying the motion to vacate quoted *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183 (*Zamudio*): " 'When the only error is a failure to advise of the consequences of the plea. . . . the sentencing court must determine whether

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[6] Attorney Miguel A. Hernandez submitted a declaration stating that defendant wrote him concerning an INS detainer asking for help but that Hernandez informed defendant's family that he could not help him with the immigration problem because he did not practice immigration law. Defendant's mother Maria Manzano Ramirez submitted an affidavit stating that she talked to attorney Octavio Maira when defendant had already been moved to Arizona. Maira said he could not work on the case with defendant in Arizona. She talked to "a Mr. Hunt in the Santa Cruz area and asked for help. He asked for $4000.00 to start, and I did not have the money." Mrs. Ramirez paid attorney Paula Samarron for a consultation. Samarron said she could not help defendant until Mrs. Ramirez brought her defendant's complete file from the Monterey County Superior Court. Mrs. Ramirez went to the superior court, "tried everything I could, but never received a copy of [defendant]'s file for over a year. By that time he had been deported to Mexico."

the error prejudiced the defendant, i.e., whether it is "reasonably probable" the defendant would not have pleaded guilty if properly advised.' [(*Id*. at p. 210.)] To establish prejudice, Petitioner must show 'that there exists, at the time of the motion, more than a remote possibility that his conviction will have one or more of the specified adverse immigration consequences[] . . . [and] that, properly advised, he would not have pleaded . . . in the first place.' *Id*. at [p.] 192."

The court concluded deportation was more than "a remote possibility, especially where, as here, it already happened." The court then stated it was not convinced defendant would have proceeded to trial if the trial court had provided the requisite statutory warning. "Mr. Ramirez's argument is based on the mistaken belief that he faced a second-degree burglary charge, which carries a sentence of up to one year in county jail or up to three years in state prison. Penal Code §§ 461 and 18. He was charged with first-degree burglary. Given the strong evidence, including his confession, the criminal case was simple. Had he proceeded to trial, at a minimum, he would have received a two-year sentence unless the court found it to be an unusual case and granted probation. A burglary conviction with a one-year sentence or more is an 'aggravated felony' under 8 U.S.C. § 1227(a)(2)(A)(iii), and deportation is mandatory. Consequently, the Court is not convinced that Defendant would have proceeded to trial had the Court provided the requisite statutory warning."

Finally, the court stated that although section 1016.5 requires defense counsel to investigate the client's immigration status, research federal immigration law and advise about specific immigration consequences in the defendant's case, the evidence that counsel gave pro forma warning was uncertain and there was no evidence that trial counsel investigated, researched, or advised defendant of the immigration consequences of his plea. "However, because trial counsel was not aware that Mr. Ramirez was not a citizen and no such concern about possible immigration consequences were triggered by the court or his client, counsel cannot reasonably be expected to have investigated the

immigration consequences of Mr. Ramirez's plea." Thus, the court found there was no prejudice to defendant. This appeal ensued.

ISSUES ON APPEAL

Defendant claims the trial court erred in denying the motion to vacate because: (1) the court relied on the wrong version of the federal statute defining aggravated felonies; (2) counsel did have a duty to advise defendant of the immigration consequences of the plea; and (3) motion counsel rendered ineffective assistance of counsel during the motion to vacate the plea.

STANDARD OF REVIEW

A motion to vacate a judgment of conviction because of a wrongfully obtained guilty plea is within the trial court's discretion and may not be disturbed on appeal absent an abuse of discretion. (*People v. Suon* (1999) 76 Cal.App.4th 1, 4.) A trial court's discretion may not be either arbitrary or capricious and must be guided and controlled by fixed legal principles, exercised in conformity with the spirit of the law. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) " '[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' " (*Ibid*.) The grounds for withdrawing a guilty plea must be established by clear and convincing evidence. (*People v. Suon*, *supra*, 76 Cal.App.4th at p. 4.)

DISCUSSION

Defendant claims denial of his motion to withdraw or vacate his plea of guilty was an abuse of discretion.

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that[:] (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists at the time of the motion, more than a remote possibility that the conviction would have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.

[Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty . . . if properly advised. [Citation.] Whether defendant knew of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice or untimeliness. [Citation.] Thus, in deciding the merits of defendant's motion to vacate, it may be important for the trial court to determine the factual issue of knowledge." (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

Defendant easily established the first requirement. He showed that he was not a citizen of the United States (*People v. Suon*, *supra*, 76 Cal.App.4th at pp. 4-5) and he stated unequivocally that he was not advised of immigration consequences. His statement was corroborated by the absence of advisement in the record which created the presumption that the court did not advise him. Trial counsel's not-remembering-if-he-did and not-remembering-if-he-did-not affidavit does not establish that he properly advised defendant. There is no indication in the record that defendant had any knowledge that the INS could take action adverse to him because of his plea of guilty.

The record also establishes that at the time of the motion, there not only was a more-than-remote possibility that the conviction could have one of the adverse specified consequences, the conviction *did* have an adverse specified consequence. Defendant was deported upon his release from prison as a result of the burglary conviction. (See *Zamudio*, *supra*, 23 Cal.4th at pp. 202-203.)

Finally, defendant must show prejudice. Whether a defendant has been prejudiced by the trial court's failure to give complete advisements of the immigration consequences of a plea is a factual question, appropriate for decision by the trial court in the first instance. The test is whether the court, after examining the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. In this context, the

court must determine whether it is reasonably probable the defendant would not have pleaded guilty if properly advised. (*Zamudio*, *supra*, 23 Cal.4th at p. 210.)

Defendant claims the trial court's reasoning in determining he was not prejudiced by the failure to advise was based on an error of law and on the failure to properly assess the likelihood that defendant would receive the aggravated term if he did not plead guilty. The court stated that the evidence, including defendant's confession, was strong; if defendant was convicted, the court stated he would have received a two-year prison term at a minimum unless the court found the case was unusual and granted probation; and "[a] burglary conviction with a one-year sentence or more is an 'aggravated felony' under 8 U.S.C. § 1227(a)(2)(A)(iii), and deportation is mandatory."

We shall take these assertions in turn. First, the court stated the evidence that defendant committed a residential burglary was strong. In considering prejudice, the probable outcome of any trial, to the extent to which it may be discerned, may be considered. (*In re Resendiz* (2001) 25 Cal.4th 230, 254.)

The trial court's assessment is supported by the record. In the instant case, the only statement of facts in the record is in the probation report. Briefly stated, on June 9, 1993, at 3:40 p.m., an 11-year-old boy saw a vehicle with a bicycle in the back seat pull up at the side of the road. The passenger got out and ran into the open garage area of a residence, got onto a bicycle and rode away. The driver drove off. The boy told his father, who canvassed the neighborhood looking for the suspects. The father saw the vehicle parked and went up to it and told the driver, the sole occupant, that he wanted to talk to him. He leaned in to grab the keys from the ignition. At this, the driver drove off at a high rate of speed. The father copied down the license plate number and reported the matter to the police.

Police determined that this vehicle belonged to defendant. On June 15, 1993, police spoke to defendant about the offense. He gave three increasingly inculpatory statements. First, he denied involvement; then, when the officer said the story was

untrue, defendant said he would tell the truth, and he stated he and one Roger Storment went to steal a bicycle. The bicycle already in the back seat was his uncle's. Storment left the vehicle to steal the bicycle and defendant was frightened away from the scene when two adult males approached him while he was sitting in his vehicle. After he left, he discarded his uncle's bicycle because he did not want anyone to think he had stolen a bicycle.

In his final version to the police officer, defendant stated he had known Storment for about three years. They discussed stealing bicycles the day before the offense; defendant wanted one because he did not own one; and the next day, defendant and Storment drove around neighborhoods looking for bicycles to steal. Defendant dropped Storment off at two locations. At the first, Storment got the bicycle that he put into the back of the car which defendant was going to keep. At the second, when Storment went to the open garage to get the bicycle that he was going to keep, two unknown males approached defendant to talk. Defendant became frightened and fled. He was worried about his being caught so he discarded the first bicycle in the area of College Drive. Witnesses observed him in this act. Storment, also, discarded the second bicycle. Neither was recovered. Defendant cooperated with the police by driving around pointing out locations where the crimes had been committed.

When Storment spoke to the police, he stated that he and defendant were stealing bicycles to alter and resell for cash. They had stolen bicycles on at least three prior occasions. Storment was eventually implicated in a bicycle theft which occurred four days after the instant offense. Defendant was never implicated or even accused of having been involved in that theft.

To the trial court's assessment that the evidence was strong, defendant responds that nevertheless, "a conviction was assured. . . . [T]he prosecution would have had to try [defendant] on an aiding and abetting theory. They would have had to argue that when Storment got out of [defendant]'s car, [defendant] knew that he was going to steal a

bicycle from a garage. The only evidence of [defendant]'s knowledge would have been from the detective who interviewed [defendant] and [who] would have testified that [defendant] told him he drove Storment to the open garage to steal the bicycle. However, in his interview with the probation officer [which presumably is how defendant would testify at a trial], [defendant] adamantly denied knowing that Storment was going to steal a bicycle. There is no evidence of written waivers or taped statements[7] and the jury would have been instructed to view the detective's testimony regarding [defendant]'s oral admission with caution. (See CALJIC No. 2.71.) [¶] Aside from the statement, there was no independent evidence to corroborate the argument that [defendant] knew Storment planned to take the bicycle." "Storment's statements implicating [defendant] would not have been admissible against [defendant]. (See *People v. Aranda* (1965) 63 Cal.2d 518; and *Bruton v. United States* (1968) 391 U.S. 123.)"

Defendant also questions whether the garage was attached to a residence. He points out there is "nothing in [defendant]'s confession indicat[ing] [defendant] knew or should have known the garage that Storment went into to steal a bicycle was attached to a residence." A person who enters an inhabited dwelling house with the intent to commit grand or petit larceny or any felony is guilty of first degree burglary. (§§ 459, 460.) Burglary of a garage which shares a common roof with and is functionally interconnected with and immediately contiguous to other portions of the house is first degree burglary. (*People v. Ingram* (1995) 40 Cal.App.4th 1397.) There need not be an interior door leading from the garage to the house. (*In re Edwardo V.* (1999) 70 Cal.App.4th 591.) However, burglary of a garage which is a separate structure is second degree burglary. (*People v. Picaroni* (1955) 131 Cal.App.2d 612.)

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[7] The only evidence in the record of defendant's statement is in the probation officer's report. It makes no mention of *Miranda* warnings but simply states, "police met with, and talked with the defendant about this offense." (*Miranda v. Arizona* (1966) 384 U.S. 436.)

Defendant raises some valid questions about the evidence, however, the court did not err in assessing it as strong.

Next, the court stated, "[h]ad he proceeded to trial, at a minimum, he would have received a two-year sentence unless the court found it to be an unusual case and granted probation." The record does not support this conclusion. Whether defendant was convicted by plea or by verdict, the factors the probation officer listed to justify a finding that the case was unusual under California Rules of Court, rule 4.413(c)(i) (hereafter rule), still existed. "[T]his offense maybe [*sic*] somewhat less serious than some other first degree burglaries involving this same limitation. The defendant also has no record of similar crimes or crimes of violence. Under rule [4.]414, the defendant was not armed with a weapon, and he appeared to be more of a passive participant in the crime. The defendant's youthfulness and his lack of a prior adult criminal record may also be considered. As for the defendant's suitability, it does appear at this point . . . that the defendant is a marginally suitable candidate to place upon felony probation . . . ." Defendant had a stable home life; he was married with a child; he had a job; he had support from his family and the community. Even if the court was inclined to consider prison as an initial sentence, it is more likely that the court would order a diagnostic study as it did before it imposed the suspended prison sentence a few years later when defendant had committed several probation violations. If the court had ordered a diagnostic study, it is very likely that a local time commitment would have been the result as it was in 1999.

Because the probable sentence if defendant were convicted at trial on the facts as stated by the probation officer was unlikely to be more harsh than the plea bargain, it is unlikely that defendant would have chosen to go to trial only to avoid a possible but not probable more onerous penalty.

Third, the court found no prejudice based on its misapprehension that "[a] burglary conviction with a *one-year sentence or more* is an 'aggravated felony' under 8

U.S.C. § 1227(a)(2)(A)(iii), and deportation is mandatory." (Italics added.) It is true that in 1994, a residential burglary conviction was an aggravated felony and deportation was mandatory (see *United States v. Becker* (9th Cir. 1990) 919 F.2d 568, 571, citing 18 U.S.C. § 16), but at that time, "the term of imprisonment imposed (regardless of any suspension of imprisonment) [had to be] at least 5 years." (1994 version of 8 U.S.C. § 1101(a)(43)(F).)

A residential burglary in California is punishable by two, four, or six years in state prison. (§ 461.) As discussed *ante*, and conceded by respondent, a six-year sentence was a very remote possibility if defendant had been convicted at trial. It is unlikely that defendant would have received a greater sentence after trial than the two-year sentence he actually received when he made his record worse by violating probation a few times. Taking into account all these considerations, it is not reasonably probable that the lack of a "bargained-for" sentence would have dissuaded defendant from going to trial if he had been properly advised.

There are other prejudicial facts evident in the record that the court did not comment on. In 1977, "the Legislature expressly recognized the unfairness inherent in holding noncitizens to pleas they entered without knowing the consequent immigration risks" by adding section 1016.5. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 250; § 1016.5 was added by Stats. 1977, ch. 1088, § 1, p. 3495.) Consequently, we question whether defendant's decision to plead guilty in the absence of knowledge of the immigration consequences " 'represent[ed] a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " (*Hill v. Lockhart* (1985) 474 U.S. 52, 56.) "[T]remendous personal stakes" are involved in deportation and exclusion "involving as it may the equivalent of banishment or exile, . . ." (*In re Resendiz*, *supra*, 25 Cal.4th at p. 245.) " 'To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later.' [Citation.]" (*Id.* at p. 251.) Defendant falls into this class of aliens.

The California Legislature provided important protections to alien defendants in section 1016.5. Subdivision (d) states that "it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea . . . be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the Legislature [-and its mandate in subdivision (b)-] that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the [immigration] possibilit[ies] . . . ."

This time would allow a knowledgeable defendant to instruct his attorney to attempt to negotiate a more favorable plea bargain that would not render him or her deportable. Or, counsel could bargain for a modification of sentence that would not subject the defendant to deportation. (*People v. Barocio* (1989) 216 Cal.App.3d 99, 106 (*Barocio*).) The example *Barocio* cites is from *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1479-1480. The court ordered Soriano sentenced to a year in the county jail. "Had the court instead suspended imposition of the sentence and sentenced Soriano to one day less than a year, Soriano would not be deportable under the statute. [Citations.]" (*Barocio*, *supra*, 216 Cal.App.3d at p. 106.) Soriano's defense counsel testified at the hearing on a petition for habeas corpus that "she was unaware that imposition of sentence suspended and imposition of a sentence of one day less than a year would remove Soriano from the class of deportable convicts. She added had she known the deportation impact of the various sentences, she would have 'tried to negotiate the case differently.' [Citation.]" (*Ibid*.)

In our case, considering the relatively innocuous facts about the crime, the fact there was no weapon or violence, the small amount of the loss, and the facts about defendant that caused the prosecution to stipulate to a local time plea in the first place and the sentencing court to find that this was an unusual case, defense counsel could have

attempted to negotiate a plea to a different charge that would not have amounted to an aggravated felony or a crime of moral turpitude. Defendant clearly was prejudiced by the failure to advise him of the immigration consequences. In light of our conclusion, we need not consider the competence of the motion counsel.

DISPOSITION

The judgment of conviction is vacated and the matter remanded for defendant to withdraw his plea of guilty.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.